A

# Dato' Seri Anwar bin Ibrahim v Public Prosecutor

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO W–05–66 OF 1998
LAMIN PCA, NH CHAN AND AHMAD FAIRUZ JJCA
16 JANUARY 1999

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***Criminal Procedure*** *— Bail — Non-bailable offence — Appellant charged with non-bailable offences — Bail refused pending trial — Whether issue of bail appealable to the Court of Appeal — Whether decision of High Court had effect of finally disposing of rights of appellant — Whether appellate court justified in interfering with discretion of judge*

C

The appellant was charged with non-bailable offences, the trial of which in the High Court is at present continuing. The High Court judge, in exercising his discretion, refused the appellant's application for bail under s 388(i) of the Criminal Procedure Code (FMS Cap 6). The appellant appealed. The issue before the court was whether the matter of bail is appealable to the Court of Appeal, taking into consideration the definition of 'decision' in s 3 of the Courts of Judicature Act 1964 ('the Act') after the amendment in 1998. Further, the court had to consider whether it was justifiable for it to interfere with the discretion exercised by the judge below.

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**Held**, dismissing the appeal:

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(1) (Per **Lamin PCA**) It was not the intention of Parliament that any decision of the High Court on any matter would be appealable to the Court of Appeal. The matter of bail may very well be extraneous to the issues to be determined in the main case. What are appealable, as intended by the current definition of the word 'decision' in s 3 of the Act, are those decisions of the High Court that have the effect of finally disposing of the rights of the parties. The very nature of bail possesses no element of finality. It is a mechanism for temporary relief from confinement. An appeal on the matter of bail was incompetent to be laid before this court and therefore, should be rightly dismissed (see p 326C–E).

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(2) (Per **Lamin PCA**) The court took into consideration the kind of situation that could prevail if the appellant was free to move about when the trial was not in session. The police would have no option but to deploy extra manpower more than what could be seen around the court building since the commencement of the trial, at the expense of public fund, in order to maintain peace and order. This sort of situation must be treated as another factor to be considered by any court as a ground for refusing bail (see p 326G–H).

H

(3) (Per **NH Chan JCA**) Section 50 of the Act provides for criminal appeals from any decision of the High Court to the Court of Appeal but those appeals — since the amendment to s 3 of the Act in 1998 — are now to be confined only to decisions which would have the effect of finally disposing of the rights of the parties. This new definition of 'decision' in the amendment does not include a

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judgment or order which does not deal with the final rights of the parties on the matters in dispute. Whether the matter of bail is appealable will depend on whether the order refusing bail to the appellant is a ruling made in the course of a trial or hearing of any cause or matter which finally disposes of the right of the parties. If bail was refused during the process of the appellant's trial, then it is not appealable as such refusal will not have the effect of determining his rights. In the present case, a decision made pending the trial of the charges against the appellant was not a decision that had the effect of finally determining the rights of the appellant. It was only the outcome of the trial that would have the effect of finally disposing of his rights. That being so, the order of the High Court in refusing to admit the appellant to bail was not appealable to this court (see pp 329C, H, 334F–G and 335F–G).

(4) (Per **NH Chan JCA**) Ordinarily, an appellate court will not interfere with the discretion exercised by a lower court on a matter relating to bail. This court would not be justified to interfere with the discretion exercised by the judge below simply because this court may have come to a different conclusion on similar material, as that would be substituting this court's discretion for that of the judge below. In the present case, the court below was informed of the reasons to refuse bail by the tendering of some police reports in court. Since this court was unable to see if those police reports contained merely vague and general allegations, the judge was presumed to have rightly exercised his discretion (see pp 340F–I and 341B–C).

**Obiter**:

(Per **NH Chan JCA**) A vague and general allegation that the accused, if released, will intimidate witnesses or tamper with the evidence is not a sound reason for refusing bail. There must be some material put before the court to substantiate the apprehension raised on behalf of the prosecution (see p 340C–D).

**[Bahasa Malaysia summary**

Perayu telah dipertuduhkan dengan kesalahan-kesalahan tak boleh jamin, yang mana perbicaraan masih berlangsung di Mahkamah Tinggi. Hakim Mahkamah Tinggi, dalam melaksanakan budi bicara beliau, telah menolak permohonan perayu untuk jaminan di bawah s 388(i) Kanun Acara Jenayah (NMB Bab 6). Perayu membuat rayuan. Isu di hadapan mahkamah ini adalah sama ada perkara jaminan boleh dirayu ke Mahkamah Rayuan, dengan mengambil kira tafsiran 'keputusan' dalam s 3 Akta Mahkamah Kehakiman 1964 ('Akta tersebut') selepas pindaan pada tahun 1998. Seterusnya, mahkamah ini harus mempertimbangkan sama ada ianya berjustifikasi mengganggu budi bicara yang dilaksanakan oleh hakim di bawah.

**Diputuskan**, menolak rayuan:

(1) (Oleh **Lamin PMR**) Ia bukanlah hasrat Parlimen bahawa sebarang keputusan Mahkamah Tinggi berkenaan mana-mana perkara boleh dirayu kepada Mahkamah Rayuan. Perkara mengenai jaminan mungkin tidak kena-mengena dengan isu-isu yang harus ditentukan dalam kes utama. Apa yang boleh dirayu, sebagaimana diniatkan oleh tafsiran semasa perkataan 'keputusan' dalam s 3 Akta tersebut, adalah keputusan-keputusan Mahkamah Tinggi yang mempunyai kesan memutuskan hak-hak pihak secara muktamad. Sifat jaminan sendiri tidak mempunyai unsur kemuktamadan. Ia adalah satu mekanisme untuk relief sementara daripada pengurungan. Suatu rayuan berkenaan perkara jaminan adalah tidak kompeten untuk dihadapkan di hadapan mahkamah ini dan dengan itu, sebetulnya ditolak (lihat ms 326C–E).

(2) (Oleh **Lamin PMR**) Mahkamah telah mengambil kira jenis keadaan yang boleh timbul sekiranya perayu boleh bergerak bebas sewaktu perbicaraan tidak berlangsung. Pihak polis tidak mempunyai pilihan lain kecuali untuk menggunakan tenaga manusia tambahan melebihi apa yang kelihatan di sekitar bangunan mahkamah sejak perbicaraan bermula, melalui pembiayaan tabung awam, demi mengekalkan keamanan dan ketenteraman. Keadaan ini mestilah dianggap sebagai satu lagi faktor untuk dipertimbangkan oleh mana-mana mahkamah sebagai alasan untuk menolak jaminan (lihat ms 326G–H).

(3) (Oleh **NH Chan HMR**) Seksyen 50 Akta tersebut memperuntukkan rayuan jenayah daripada sebarang keputusan Mahkamah Tinggi kepada Mahkamah Rayuan tetapi rayuan-rayuan itu — sejak pindaan kepada s 3 Akta tersebut pada tahun 1998 — kini hendaklah dihadkan kepada keputusan yang akan mempunyai kesan memutuskan hak pihak-pihak secara muktamad. Tafsiran 'keputusan' yang baru ini dalam pindaan tersebut tidak merangkumi satu penghakiman atau perintah yang tidak memutuskan hak muktamad pihak-pihak atas perkara yang dipertikaikan. Sama ada hal yang kena-mengena dengan jaminan boleh dirayu akan bergantung kepada sama ada perintah yang menolak jaminan untuk perayu adalah penghakiman yang dibuat semasa perbicaraan atau pembicaraan sebarang kausa or perkara yang memutuskan hak pihak-pihak secara muktamad. Sekiranya jaminan ditolak semasa perlangsungan perbicaraan perayu, maka ia tidak boleh dirayu kerana penolakan sedemikian tidak akan mempunyai kesan menentukan haknya. Dalam kes ini, suatu keputusan yang dibuat semasa menantikan perbicaraan pertuduhan terhadap perayu bukanlah keputusan yang mempunyai kesan menentukan hak perayu secara muktamad. Hanya keputusan perbicaraan mempunyai kesan menentukan hak perayu secara muktamad. Dengan itu, perintah Mahkamah Tinggi enggan membenarkan jaminan kepada perayu tidak boleh dirayu kepada mahkamah ini (lihat ms 329C, H, 334F–G dan 335F–G).

(4) (Oleh **NH Chan HMR**) Pada biasanya, sesebuah mahkamah rayuan tidak akan mengganggu budi bicara yang dilaksanakan oleh mahkamah bawah atas perkara yang berkaitan dengan jaminan. Mahkamah ini tidak berjustifikasi mengganggu budi bicara yang dilaksanakan oleh hakim di bawah semata-mata kerana mahkamah ini mungkin akan mencapai kesimpulan yang berbeza atas bahan yang serupa, kerana ini sama seperti menggantikan budi bicara hakim bawah dengan budi bicara mahkamah ini. Dalam kes ini, mahkamah bawah telah diberitahu tentang sebab-sebab untuk menolak jaminan melalui pengemukaan beberapa laporan polis di mahkamah. Oleh kerana mahkamah ini tidak dapat melihat sama ada laporan polis tersebut mengandungi tohmahan yang tidak jelas dan am semata-mata, hakim dianggap telah melaksanakan budi bicara beliau dengan betul (lihat ms 340F–I dan 341B–C).

**Obiter:**

(Oleh **NH Chan HMR**) Pengataan yang tidak jelas dan am bahawa tertuduh, jika dibebaskan, akan mengugut saksi-saksi atau mengusik keterangan bukanlah alasan yang kukuh untuk menolak jaminan. Semestinya terdapat bahan di hadapan mahkamah bagi menyokong kekhuatiran yang ditimbulkan bagi pihak pendakwa (lihat ms 340C–D).]

**Notes**

For cases on bail for non-bailable offences, see 5 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 560–579.

**Cases referred to**

*Ang Gin Lee v PP* [1991] 1 MLJ 498 (refd)
*Babu Singh v State* AIR 1978 SC 527 (refd)
*Bihar Legal Support Society, New Delhi v Chief Justice of India* AIR 1987 SC 38 (refd)
*Charles Osenton & Co v Johnston* [1942] AC 130 (refd)
*Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232 (refd)
*Emperor v Abhairaj Kunwar* AIR 1940 Oudh 8 (refd)
*Evans v Bartlam* [1937] AC 473 (refd)
*Guru v Emperor* AIR 1930 Bom 484 (refd)
*Ingley & Ors v Emperor* AIR 1944 Nagpur 149 (refd)
*KS Menon, Re* [1946] MLJ 49 (refd)
*Maleb bin Su v PP* [1984] 1 MLJ 311 (refd)
*Paras Ram v The State* AIR 1951 Himachal Pradesh 13 (refd)
*PP v Chew Siew Luan* [1982] 2 MLJ 119 (refd)
*PP v Dato' Mat* [1991] 2 MLJ 186 (refd)
*PP v Leong Ying Ming* [1993] 1 MLJ 177 (refd)
*PP v Wee Swee Siang* [1948] MLJ 114 (refd)
*PP v Zulkifflee bin Hassan* [1990] 2 MLJ 215 (refd)

*R v West Kent Quarter Sessions Appeal Committee, ex parte Files* [1951] 2 All ER 728 (refd)
*Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 (refd)
*Reed (a debtor), Re* [1979] 2 All ER 22 (refd)
*Saad bin Abas & Anor v PP* [1999] 1 MLJ 129 (refd)
*Sillem v Attorney-General* (1864) 10 HL Cas 704 (refd)
*Subbarama Iyer v State* AIR 1953 Travancore-Cochin 25 (refd)
*Sulaiman bin Kadir v PP* [1976] 2 MLJ 37 (refd)

**Legislation referred to**

Constitution of India art 136(1) [Ind]
Courts of Judicature Act 1964 ss 3, 50
Criminal Procedure Code (FMS Cap 6) ss 2(i), 388(i), 389, 394

**Appeal from**: Criminal Cases Nos 45–47 of 1998, 45–48 of 1998, 45–49 of 1998, 45–50 of 1998, 45–51 of 1998, 45–52 of 1998, 45–53 of 1998 and 45–54 of 1998 (High Court, Kuala Lumpur)

*Raja Aziz Addruse* (*Christopher Fernando, Gurbachan Singh, Sankara N Nair, Zulkifli Nordin, Robyn Choi* and *Pawancheek Marican* with him) (*SN Nair & Partners*) for the appellant.

*Abdul Gani Patail* (*Azahar Mohamed* and *Mohd Yusof Haji Zainal Abiden* with him) (Deputy Public Prosecutor) for the respondent.

*16 January 1999*

**Lamin PCA**:

My learned brother NH Chan JCA will now deliver the judgment of the court. (NH Chan JCA reads the judgment of the court.)

This court, as you have just heard, has no jurisdiction to entertain an appeal on the subject of bail.

However, if I may add one other point. Raja Aziz Addruse, one of the learned counsel for the appellant (the accused below) submitted that the definition of the word 'decision' in s 3 of the Courts of Judicature Act 1964 as amended would appear to exclude a ruling on any matter extraneous to the disposal of issues in the main action. He said that a bail application would be such a matter. A matter of bail is determined in the light of whether it is a bailable offence (s 387 of the Criminal Procedure Code (FMS Cap 6) ('the CPC')) or a non-bailable offence (s 388 of the CPC). The CPC defines what is a 'bailable offence' and what is a 'non-bailable offence'. Clearly, therefore, it must relate to the charge with which an accused person is preferred. The purpose of a criminal trial is to dispose of the case in respect of the charge. The question of bail cannot be said to be unrelated to the trial. A non-bailable offence is indicated in the First Schedule of the CPC as being an offence against which the words 'not bailable' appear. At first blush, the words 'non-bailable offence' or 'not bailable offence' suggest that when a person is charged with a non-bailable offence, he is not to have his freedom until he is freed of the charge because he has been accused of having committed a serious offence. However, the

court is given a complete discretion to decide whether to allow bail or not (s 388 of the CPC). A court has to consider various interests such as those of the state, the public, the accused, the prosecution and the court before it can exercise its judicial discretion whether to grant bail or not. The issue before us is whether the matter of bail is appealable to the Court of Appeal. The Courts of Judicature Act 1964 ('the Act') spells out the areas of jurisdiction for the Court of Appeal both criminal and civil. Its criminal jurisdiction is found within the terms of s 50 of the Act. Section 50 employs the word 'decision' with its definition provided for in s 3. As it has been suggested, the definition of the word 'decision' would exclude any ruling on any matter extraneous to the issues to be determined in the main case. This, as I understand it, would mean any decision of the High Court on any matter would be appealable to the Court of Appeal. That cannot be the intention of Parliament. The matter of bail may very well be extraneous to the issues to be determined in the main case. But that is not the issue. What are appealable, as is intended by the current definition of the word 'decision', are those decisions of the High Court that have the effect of finally disposing of the rights of parties. To get bail is not as of right. Bail under s 388 of the CPC is granted at the complete discretion of the court.

The very nature of bail possesses no element of finality. It is something of a respite. It is a mechanism for temporary relief from confinement. Once given, it is capable of being withdrawn. Upon refusal, it can be reapplied. With the greatest of respect, I am unable to accept the interpretation as submitted by learned counsel for the appellant. I am therefore quite clear in my own mind that an appeal on the matter of bail is incompetent to be laid before this court and therefore is rightly dismissed. With that, the proceedings of this morning should end.

However, with the happenings around this court building where the trial involving the appellant also takes place, I feel compelled to make an observation. Tremendous noise caused by shouts is heard every day of the trial, particularly at the time when the court adjourns for the day and the appellant is making his exit from this building. This has become public knowledge. I consider such noises to constitute a breach of the peace. I can well imagine the kind of situation that can prevail if the appellant is free to move about when the trial is not in session, the police will have no option but to deploy extra manpower more than what you can see around the court building since the commencement of the trial, of course at the expense of public fund in order to maintain peace and order. To my mind, this sort of situation must be treated as another factor to be considered by any court as a ground for refusing bail.

*16 January 1999*

**NH Chan JCA**: This appeal concerns the refusal of the High Court to grant bail *pendente lite* to the appellant (*PP v Dato' Seri Anwar bin Ibrahim* [1998] 4 MLJ 481). The trial in the High Court is at present continuing and will go on, so it appears, for some considerable time still to come considering that it is making progress at a snail's pace.

All the offences for which the appellant has been charged are non-bailable offences. Section 388(i) of the Criminal Procedure Code (FMS Cap 6) ('the CPC') provides for the granting of bail in non-bailable offences. It says:

> When any person accused of any non-bailable offence is arrested or detained without warrant by a police officer or appears or is brought before a Court, he may be released on bail by the officer in charge of the police district or by such Court, but he shall not be so released if there appears reasonable grounds for believing that he has been guilty of an offence punishable with death or imprisonment for life:
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> Provided that the Court may direct that any person under the age of sixteen years or any woman or any sick or infirm person accused of such an offence be released on bail.

Even though s 388(i) refers to non-bailable offences, bail is not to be refused just because the offence is said to be non-bailable. '... the term 'non-bailable' is not equivalent to the term 'unbailable' which means bail is absolutely prohibited. In the CPC, s 388 provides for the grant or refusal of bail in non-bailable offences' (Mimi Kamariah Majid and Lee Oi Kuan, *Malaysian Law on Bail*, (1986) at p 36).

'If bail is refused by the subordinate court, the accused can appeal to the High Court under s 394 of the CPC or the accused can apply to the High Court to exercise its discretion under s 389 of the CPC and admit the accused to bail' (*Malaysian Law On Bail*, (1986) at p 72). Section 394 of the CPC reads:

> Any person aggrieved by any order or refusal of any inferior Court made under this Chapter may appeal to the High Court, which may confirm, vary or reverse the order of such inferior Court.

And the material part of s 389 of the CPC reads:

> ... and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.

And 'Court' here in s 389 of the CPC means (see s 2(i)):

> In this Code —
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> ...
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> 'Court' means the High Court, a Sessions Court, or the Court of a Magistrate of any class, as the context may require ... .

Of course, any practitioner at the criminal Bar who is worth his salt invariably would apply to the High Court under s 389 for bail if it was refused by a subordinate court. It would not be practicable to appeal under s 394 as an appeal could take a much longer time before it could be heard. That is why the appeal procedure (under s 394) was hardly, if ever, used by experienced counsel at the criminal Bar. See *Sulaiman bin Kadir v PP* [1976] 2 MLJ 37 where said Harun J (as he was then) said (at p 37):

This is an application for bail pending trial [to the High Court]. ... A

... The learned deputy public prosecutor has raised the issue whether this application is properly before this court. He contends that the application is in effect an appeal from the refusal of the learned president to grant bail and that therefore these proceedings should be brought by notice of appeal under s 394 of the CPC which reads:

'Any person aggrieved by any order or refusal of any inferior Court made B under this Chapter may appeal to the High Court, which may confirm, vary or reverse the order of such inferior Court.'

The present application is by notice of motion under s 389 of the CPC which reads:

'The amount of every bond executed under this Chapter shall be fixed C with due regard to the circumstances of the case as being sufficient to secure the attendence of the person arrested, but shall not be excessive; and a Judge may, in any case, whether there be an appeal on conviction or not, direct that any person be admitted to bail or that the bail required by a police officer or Court be reduced or increased.'

The difference between the two procedures is simply this: if it is an appeal, it D will take a longer time to be heard because there has to be a notice of appeal and the subordinate court will have to state its reasons for refusal before the petition of appeal can be filed and eventually heard but if it is an ,application by notice of motion supported by affidavit, it can be made immediately after refusal without notice to the subordinate court (but with notice to the Public Prosecutor) and the application can even be heard by the High Court on the same day or very soon thereafter, speed being the essence of such an E application.

There does not appear to be any authority as to which is the proper course to take in such cases. In my view, if a person should not be kept in custody for a moment longer than is necessary then the speedy procedure of s 389 is obviously indicated. But there are other compelling reasons why s 389 is the appropriate procedure. That section gives the High Court absolute F discretionary powers to vary bail from time of arrest right up to the time of conviction. It may grant bail when bail has been refused. It may reduce the amount of bail if the amount is excessive. It may increase the amount of bail if the amount is insufficient. But it may not order custody if bail has been granted. The appeal provisions of s 394 of the CPC, on the other hand, are intended to deal with matters not provided for under s 389 of the CPC, for G instance, if an accused person had been admitted to bail by a subordinate court contrary to s 388(i) of the CPC. As this application arises out of a refusal to grant bail, the provisions of s 389 apply and I accordingly hold that it is properly before this court.

But, can there be an appeal from the High Court to the Court of Appeal if bail was refused by a judge of the High Court, as in this case? As said by H Lord Goddard CJ in *R v West Kent Quarter Sessions Appeal Committee, ex parte Files* [1951] 2 All ER 728 at p 730:

It is most elementary that no appeal from a court lies to any other court unless there is a statutory provision which gives a right to appeal. The decision of every court is final if it has jurisdiction, unless an appeal is given by statute. I

See also *Sillem v Attorney-General* (1864) 10 HL Cas 704 where the House of Lords held that the creation of a right of appeal is an act which requires legislative authority: see judgment by Lord Westbury LC at p 719.

There is no right of appeal at law from a decision of a court to any other court unless there is a statutory provision which gives a right to appeal. The creation of a right of appeal is an act which requires legislative authority. The right to appeal from one court to another must be conferred by some statute, otherwise, the decision of every court of law is final. There is no provision in the CPC or in the current version of the Courts of Judicature Act 1964 ('the Act') (that is, after the amendment to s 3 on the meaning of 'decision' in 1998 by Amendment Act A1031) which gives a right of appeal from an order of the High Court granting or refusing to grant bail. Section 50 of the Act provides for criminal appeals from any decision of the High Court to the Court of Appeal but those appeals (since the amendment to s 3 in 1998) are now to be confined only to decisions which would have the effect of finally disposing of the rights of the parties. Section 50 of the Act reads as follows:

> (1) Subject to any rules regulating the proceedings of the Court of Appeal in respect of criminal appeals, the Court of Appeal shall have jurisdiction to hear and determine any appeal against any decision made by the High Court —
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> (a) in the exercise of its original jurisdiction; and
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> (b) in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by the Sessions Court.
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> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.

And s 3 now gives the meaning of 'decision' as:

> In this Act, unless the context otherwise requires —
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> ...
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> 'decision' means judgment, sentence or order [but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties]; ... .

The words which we have bracketed were added by Amendment Act A1031 of 1998 which came into force on 31 July 1998.

This new definition of 'decision', as in the amendment, does not include a judgment or order which does not deal with the final rights of the parties on the matters in dispute. In other words, what has been excluded from the meaning of the word 'decision' is the type of judgments and orders which is termed 'interlocutory' by 26 *Halsbury's Laws of England* (4th Ed) para 506 at p 240, which reads:

> Interlocutory judgments and orders. An order which does not deal with the final rights of the parties, but either (1) is made before judgment, and gives no final decision on the matters in dispute, but is merely on a matter of procedure, or (2) is made after judgment, and merely directs how the declarations of right already given in the final judgment are to be worked out, is termed 'interlocutory'.

> An interlocutory order, even though not conclusive of the main dispute, may be conclusive as to the subordinate matter with which it deals.

Shortly stated, what the amendment means is that a judgment or order which does not deal with the final rights of the parties, but is made *pendente lite*, and gives no final decision on the matters in dispute, is not a 'decision' within the meaning of that word in the current version of s 3 of the Act, and therefore is not appealable. It makes no difference that such a judgment or order is final, that is to say conclusive, as to the subordinate matter with which it deals. For instance, an order granting or refusing bail is final (conclusive) as to the application with which it deals but it is still an order which does not deal with the final rights of the parties. Such an order is made before judgment or sentence and gives no final decision on the matters in dispute. A judgment or order, even though not conclusive (final) of the main dispute, may be conclusive (final) as to the subordinate matter with which it deals. In this way, an interlocutory judgment or order may be conclusive (final) as to the subordinate matter with which it deals even though it is not conclusive (final) of the main dispute.

The real distinction is between (for want of a better word) what is called final judgments and orders and interlocutory judgments and orders. In general, a judgment or order which determines the principal matter in question is termed 'final': see 26 *Halsbury's Laws of England*, para 505 at p 238. Actually, the use of the term 'final' is tautological as all judgments and orders are final. The term (final) is used for the purpose of distinguishing between judgments and orders and 'interlocutory' judgments and orders. The difference is that judgments and orders which are not termed 'interlocutory' judgments and orders are appealable under the new meaning of the word 'decision' as defined in s 3 by the 1998 amendment. In other words, judgments and orders which determine the principal matter in question are termed 'final' judgments and orders, and they are appealable. But, those judgments and orders which give no final decision on the matters in dispute (which are termed 'interlocutory' judgments and orders) are now no longer appealable.

Previously, the words on the meaning of 'decision' (in s 3) read:

> 'decision' includes judgment, sentence or order; ... .

It is wrong to hold (as held in the High Court case of *Maleb bin Su v PP* [1984] 1 MLJ 311) that the above words mean a decision which would 'finally dispose of the rights of the accused persons'. That would be adding words which are not there to a statutory provision. (*Maleb* was approved obiter in *Ang Gin Lee v PP* [1991] 1 MLJ 498, where Hashim Yeop A Sani CJ said at p 500:

> There is no doubt in the present case that the order has a final effect and disposes of the right of the applicant. But that is not the end of the matter. To satisfy s 307(i) of the CPC it is also necessary to answer the equally crucial question — was the order made in a criminal case or matter?

Since the order in question in *Ang Gin Lee* 'has a final effect and disposes of the right[s] of the applicant', it was not necessary to the decision in *Ang* to apply *Maleb* which was a decision that extended the meaning of the words 'judgment, sentence or order' to mean a judgment or order which would finally dispose of the rights of the parties.)

These words 'judgment, sentence or order' are almost similar in phraseology to that of art 136(1) of the Constitution of India which provides for the granting of special leave to appeal to the Supreme Court of India from any '*judgment*, decree, determination, *sentence* or *order*' passed or made by any court in India. Article 136(1) reads:

> Notwithstanding anything in this Chapter, the Supreme Court may, in its discretion, grant special leave to appeal from any *judgment*, decree, determination, *sentence or order* in any case or matter passed or made by any court or tribunal in the territory of India. (Emphasis added.)

Previous to the 1998 amendment, in this country, there was always a right of appeal from orders of the High Court on bail matters to the former Federal Court, the then Supreme Court and a fortiori by succession the present Court of Appeal (see *PP v Chew Siew Luan* [1982] 2 MLJ 119, *PP v Zulkifflee bin Hassan* [1990] 2 MLJ 215, *PP v Dato' Mat* [1991] 2 MLJ 186 and *PP v Leong Ying Ming* [1993] 1 MLJ 177). But in India, appeals on bail matters to the Supreme Court of India are by special leave of that court only.

Yet in India, its Supreme Court, despite art 136, is ordinarily unwilling to interfere with orders granting or refusing bail by the High Court as it has considered that these are matters where it should be treated as final at the High Court. See *Iyer's Law of Bails*, (4th Ed) 1988 at p 254:

> 91 Practice of Supreme Court — The Supreme Court does not ordinarily, in the exercise of its discretion under art 136, entertain petitions for special leave to appeal against orders granting or refusing or cancelling bail or anticipatory bail. These are matters where the High Court should become final and the Supreme Court should not entertain petition for appeal leave.
>
> Ordinarily, the Supreme Court is loath to interfere with orders granting or refusing bail but it cannot be an insurmountable obstacle in the way of rectifying an order which tends to disclose miscarriage of justice (*Pokar Ram v State of Rajasthan* AIR 1985 SC 969).
>
> Normally the Supreme Court does not interfere with bail matters and the orders of the High Court are generally accepted to be final relating to grant o[r] the rejection of bail.

In *Bihar Legal Support Society, New Delhi v Chief Justice of India* AIR 1987 SC 38, the Indian Supreme Court (PN Bhagwati CJ, Ranganath Misra, V Khalid, GL Oza and MM Dutt JJ) said at p 40, by PN Bhagwati CJ:

> The apex court has evolved, as a matter of self-discipline certain norms to guide it in the exercise of its discretion in cases where special leave petition are filed against orders granting or refusing bail or anticipatory bail. These norms have

to be articulated in order that the people may know as to what is the judicial policy of the apex court in entertaining such special leave petitions. That would go a long way towards introducing a measure of certainty in judicial response to such special leave petitions and would also tend to reduce the inflow of such special leave petitions. This was the reason why a bench of this court consisting of two of us, viz, the Chief Justice and Justice Rangannath Misra, clearly enunciated in an order made on 30 October 1985, in Special Leave Petititon (Criminal) No 2938 of 1985, that this court should not 'interfere with the orders granting or refusing bail or anticipatory bail' and that 'these are matters in which the High Court should normally become the final authority'. We reiterate this policy principle laid down by the bench of this court and hold that this court should not ordinarily, save in exceptional cases, interfere with orders granting or refusing bail or anticipatory bail, because these are matters in which the High Court should normally be the final arbiter.

See also *Bail, Law and Practice* by MR Mallick (1990) at pp 187 and 188, where the learned author has put it succinctly, thus:

3 Grant or refusal of bail by High Court or other court and interference by Supreme Court

The Supreme Court has clearly observed that under art 136 of the Constitution the Supreme Court generally does not interfere, except in exceptional circumstances with the grant or refusal of bail by High Court. PN Bhagawati CJ, in *Bihar Legal Support Society v Chief Justice of India* AIR 1987 SC 38, has observed that the Supreme Court has evolved as a matter of self-discipline certain norms to guide it in the exercise of its discretion in cases where special leave petitions are filed against order granting or refusing bail or anticipatory bail, that these norms have to be articulated in order that the people may know as to what is the judicial policy of the apex court in entertaining such special leave petitions and that would go a long way towards introducing a measure of certainty in judicial response to such special leave petitions and would also tend to reduce the inflow of such special leave petitions. The following observation of the learned judge reads thus:

> 'This was the reason why a bench of this court consisting two of us viz, the Chief Justice and Justice Ranganath Misra, clearly enunciated in an order made on 30 October 1985 in Special Leave Petition (Criminal) No 2938 of 1985 that this court should not 'interfere with the orders granting or refusing bail or anticipatory bail', and that 'these are matters in which the High Court should normally become the final authority'. We reiterate, this is also the principle laid down by the bench of this court and hold that this court should not ordinarily, save in exceptional cases, interfere with the orders granting or refusing bail or anticipatory bail, because these are matters in which the High Court should normally be the final arbiter.'

On the other hand, in this country we have never had any judicial policy such as that of the Indian Supreme Court which has laid down the rule that the High Court should normally be the final authority when it comes to granting or refusing bail.

The reason for such a judicial policy to exist in India is that the Supreme Court of India does not consider itself as a regular court of appeal.

A It declares that it will 'interfere only in the limited class of cases where there is a substantial question of law involved which needs to be finally laid at rest by the apex court for the entire country or where there is grave, blatant and atrocious miscarriage of justice.' This is how it was put by Bhagwati CJ in *Bihar Legal Support Society, New Delhi v Chief Justice of India,* at pp 39 and 40:

B

> It may, however, be pointed out that this court was never intended to be a regular Court of Appeal against orders made by the High Court or the sessions court or the magistrates. It was created as an apex court for the purpose of laying down the law for the entire country and extraordinary jurisdiction for granting special leave was conferred upon it under art 136 of the Constitution
> C so that it could interfere whenever it found that law was not correctly enunciated by the lower courts or tribunals and it was necessary to pronounce the correct law on the subject. This extraordinary jurisdiction could also be availed by the apex court for the purpose of correcting grave miscarriage of justice, but such cases would be exceptional by their very nature. It is not every case where the apex court finds that some injustice has been done that it would
> D grant special leave and interfere. That would be converting the apex court into a regular court of appeal and moreover, by so doing, the apex court would soon be reduced to a position where it will find itself unable to remedy any injustice at all on account of the tremendous backlog of cases which is bound to accumulate. We must realize that in the vast majority of cases the High Courts must become final even if they are wrong. The apex court can also be wrong on occasions but since there is no further appeal, what the apex court
> E says is final. That is why one American judge said of the Supreme Court of the United States: 'We are right because we are final: we are not final because we are right'. We must, therefore, reconcile ourselves to the idea that like the apex court which may be wrong on occasions, the High Court may also be wrong and it is not every error of the High Court which the apex court can possibly correct. ... the apex court must interfere only in the limited class of cases
> F where there is a substantial question of law involved which needs to be finally laid at rest by the apex court for the entire country or where there is grave, blatant and atrocious miscarriage of justice. Sometime, we judges feel that when a case comes before us and we find that injustice has been done, how can we shut our eyes to it. But the answer to this anguished query is that the judges of the apex court may not shut their eyes to injustice but they must
> G equally not keep their eyes too wide open, otherwise the apex court would not be able to perform the high and noble role which it was intended to perform according to the faith of the constitution makers. It is for this reason that the apex court has evolved, as a matter of self-discipline, certain norms to guide it in the exercise of its discretion in cases where special leave petition are filed against orders granting or refusing bail or anticipatory bail.

H On the other hand, in this country our appellate courts have always regarded themselves as regular courts of appeal. Indeed, before the 1998 amendment to the meaning of 'decision' in s 3 of the Act, appeals from the High Court to the former Federal Court and the then Supreme Court on bail matters have been common place, at least for the Public Prosecutor (see
I for example, *PP v Chew Siew Luan* [1982] 2 MLJ 119, *PP v Zulkifflee bin Hassan* [1990] 2 MLJ 215, *PP v Dato' Mat* [1991] 2 MLJ 186 and *PP v Leong Ying Ming* [1993] 1 MLJ 177). The reason why there was no decision in the law reports of appeals from the High Court to the former Federal

Court and the then Supreme Court from orders refusing to grant bail was that most of the criminal cases had originated from the subordinate courts and on appeal would end up in the High Court as the final court. There was only a handful of cases where accused persons have been tried initially at the High Court in the exercise of its original jurisdiction. One was a murder case (*PP v Mokhtar Hashim*, reported as *Dato Mokhtar bin Hashim & Anor v PP* [1983] 2 MLJ 232) where bail would be disallowed in the ordinary way. In all the other cases where the High Court was the trial court, bail had been allowed. The instant appeal is the first appeal against a refusal of bail by the High Court (as the court of trial) to the Court of Appeal.

But, after the amendment to s 3 on the meaning of 'decision' by Amendment Act A1031 of 1998, this court has held recently (*Saad bin Abas & Anor v PP* [1999] 1 MLJ 129) that criminal appeals from any decision of the High Court to the Court of Appeal are to be restricted only to decisions which would have the effect of finally determining the rights of the parties. This is how it was put by my Lord Lamin PCA at p 138:

> Now we may recall s 50(2) of the Courts of Judicature Act 1964, it employs the word 'decision' which is defined in s 3. Early this year by Amendment Act A1031 of 1998, that definition was amended to read:
>
> > "decision' means judgment, sentence or order, but does not include any ruling made in the course of a trial or hearing of any cause or matter which does not finally dispose of the rights of the parties.'
>
> So, for the purpose of s 50(2), this court has first to ascertain whether the 'decision' of the High Court in ordering the applicants before us to enter on their defence was a ruling that had the effect of finally disposing of their rights. Certainly not, and it would only happen after a decision had been made at the close of the defence.

So the question in the instant appeal is: is the order of the High Court as the court of first instance refusing bail appealable to the Court of Appeal in the present case? The answer will depend on whether the order refusing bail to the appellant is a 'ruling made in the course of a trial or hearing of any cause or matter which finally disposes of the rights of the parties'. If the bail was refused during the process of the appellant's trial, then it is not appealable as such refusal would not have the effect of finally determining his rights.

In *Babu Singh v State* AIR 1978 SC 527, the Supreme Court of India has held that even if a previous application for bail was rejected by the Supreme Court, a fresh application for bail can be moved to the same court if new circumstances or developments arise for the applicants to apply for bail again. This is what the Indian Supreme Court (VR Krishna Iyer and DA Desai JJ) said at p 528, by VR Krishna Iyer J:

> Briefly we will state the facts pertinent to the present petition and prayer and proceed thereafter to ratiocinate on the relevant criteria in considering the interlocutory relief of bail. Right at the beginning we must mention that, at an earlier stage, their application for bail was rejected by this court on 7 September 1977. But an order refusing an application for bail does not necessarily preclude another, on a later occasion, giving more materials, further developments and different considerations. While we surely must set store by this circumstance, we cannot accede to the faint plea that we are

A barred from second consideration at a later stage. An interim direction is not a conclusive adjudication, and updated reconsideration is not overturning an earlier negation. In this view, we entertain the application and evaluate the merits pro and con.

In *Babu Singh*, the Indian Supreme Court has clearly laid down the B principle that an order refusing bail does not bar another application for bail on a later occasion.

In *Babu Singh*, all the six appellants were acquitted by the sessions judge for the offence of murder. On appeal against the acquittal, the High Court convicted the appellants and sentenced them to life imprisonment. Pending their appeal to the Supreme Court, five of the appellants applied to that C court for bail. After their first application for bail was rejected by the Supreme Court, they applied again to the Supreme Court for bail six months later and this time the Supreme Court released them on bail.

*Babu Singh* is not a case of an appeal from the High Court to the Supreme Court against a refusal of bail by the High Court but the judgment D is useful for the purpose of the present case as it goes to show that the grant or refusal of bail is actually a ruling made in the course of a trial or hearing of any cause or matter which does not finally determine the rights of the parties. As such, the grant or refusal of bail is not a 'decision' within the meaning of that word in s 3 of the Act as it applies today because such a decision (ruling) does not have the effect of finally determining the rights of E the parties.

A decision made pending the trial of the charges against the appellant is not, in our considered opinion, a decision (ruling) that had the effect of finally determining the rights of the appellant. It is only the outcome of the trial that would have the effect of finally disposing of his rights. A decision F on bail (by the court of first instance), whether the grant or refusal of it, will not finally determine the rights of the appellant in the outcome of his trial. That being so, the order of the High Court in refusing to admit the appellant to bail is not appealable to the Court of Appeal.

On the merits of the appeal, however, since we have allowed counsel to G argue strenuously on them before us, we think that it is only right for us to say a few words. We find that there is only one ground of substance in the appellant's appeal and it concerns the question of the danger of witnesses being tampered with by an accused person. The judge below had relied on *PP v Wee Swee Siang* [1948] MLJ 114 where this passage from the judgment of Callow J was cited by him with approval. Callow J said at p 115:

H > On the other hand, the learned deputy public prosecutor spoke of the likelihood of interference with prosecution witnesses, and that is a strong reason. At p 969 of *Sohoni's Code of Criminal Procedure* it states —
>
> > 'Any allegation that the accused is tampering or attempting to tamper with evidence would be a cogent ground for refusing bail.'
>
> I Here the allegation made before and accepted by the learned district judge is that there was good reason to expect interference with witnesses.

That quotation from Sohoni could give the impression that any allegation of tampering without any material to support it will suffice.

It is most regrettable that the judge below in the year 1998 had to resort to a 50 year old edition of *Sohoni's Code of Criminal Procedure* (which was relied on by Callow J in 1948) without realizing that the editors of this well known textbook had already revised the book and its views in subsequent editions. The latest edition of *Sohoni's Code of Criminal Procedure* (19th Ed), 1997 reads at p 4795:

> Where allegations are made that the accused might abscond or tamper with evidence or the like, bail will not be refused merely on the basis of vague allegations. There must be material on record which may give indication of such a possibility (*State of Maharashtra v Nainmul Punjaji Shah* [1970] 1 SCWR 37).

And at p 4797:

> Courts have repeatedly pointed out that a vague and general allegation that the accused would tamper with the evidence is not a sound reason for refusing bail.

See *Ingley & Ors v Emperor* AIR 1944 Nagpur 149 where the headnote reads at p 150:

> A vague and general allegation that the accused would tamper with evidence is not a sound reason for refusing bail: AIR 1930 Bom 484.

Niyogi J, at p 150, put it thus:

> The bail was refused in the two courts below on the ground that some government servants were suspected to be acting in league with Ingley and that further investigation on that line was in progress and that the applicants if enlarged on bail were likely to abuse their liberty by tampering with the evidence and suborning the witnesses.

and the judge concluded thus, at p 151:

> As regards the fear of tampering with the evidence and suborning of witnesses, there is nothing but a vague and general allegation which is not a sound reason for refusing bail: see AIR 1930 Bom 484.

And in *Guru v Emperor* AIR 1930 Bom 484, the headnote reads:

> When the allegations against a prisoner are of a vague and general character and are not better defined or substantiated, they are not sufficient grounds for refusing an application to enlarge a prisoner on bail; AIR 1926 Rang 51 and AIR 1927 Rang 205 followed.

Mirza J said, at pp 485 and 486:

> The sessions judge proceeds to state:
>
> > 'It is still urged by the learned Public Prosecutor and I consider with some justification, that if the accused are released on bail the evidence is likely to be tampered with. I do not think that this is a fit case for allowing bail to the accused.'
>
> When the application first came before us on 10 April we allowed it to stand over to enable the government pleader to ascertain from those instructing him as to the exact nature of the apprehension on the part of the Public Prosecutor

A that if the accused is released on bail he is likely to tamper with the prosecution evidence. Sayad Usman Dagdoo, the sub-inspector of police in charge of the investigations, has now made an affidavit in which he sets out the following grounds. He states that in the course of investigations, it has come to his knowledge that the applicant's co-accused, one Jaibai Karale, had pledged a gold ornament with the applicant and the same cannot now be traced. He
B apprehends that if the applicant is let out on bail it would be difficult for the prosecution to trace the ornament. He says in his affidavit that the applicant is a wealthy and influential man in Poona and if he is let out on bail he might win over the witnesses for the prosecution. He further alleges that a sum of Rs2,676 in respect of the price of certain milk supplied to the Sassoon Hospital, instead of being paid to one Mulik who was the milk contractor at
C the time, was paid to one Mahadu Martand who was a peon in the Sasson Hospital and was attached at the time to the applicant who was the hospital steward. The sub-inspector states that if the applicant is freed from custody the peon Martand may not possess courage enough to say what he knows against the applicant.

D With regard to the first one of these allegations the prosecution have not been able so far to trace the ornament which they allege was pledged with the applicant by his co-accused Jaibai. It is not clear how they would be hindred (sic) in tracing it if the applicant is let out on bail. The second allegation, viz that the applicant is a wealthy and influential man in Poona and is therefore likely to win over the prosecution witnesses does not appear to us to be sufficiently cogent or convincing. It is common ground that there is no
E previous conviction against the applicant and that he has retired from Government service on a pension of Rs100 per month. We have no materials before us which would show that the applicant is a man of bad character or is likely to intimidate or otherwise win over the prosecution witnesses to his side. With regard to the third allegation it is shown that the applicant retired from his post of steward in the Sasson Hospital two years ago and the peon Mahadu
F Martand has since continued in Government employment in the Hospital. There is no sufficient reason for us to suppose that Mahadu Martand would be under the influence of the applicant when he comes out on bail and would not be forthcoming to give true evidence against him at the trial. It is stated before us that Mahadu Martand has already made a statement before the police as to what he knows with regard to these alleged offences.

G The principle on which the courts act in refusing bail in such matters is stated by Doyle J in *Mohammed Eusoof v King-Emperor* AIR 1926 Rang 51, as follows, at p 53:

> 'Again, while mere vague allegations that the prisoner, if released, will tutor witnesses should not be taken into account, the magistrate may well refuse to enlarge on bail where the prisoner is of such a character that his
H presence at large will intimidate witnesses, or where there are reasonable grounds for believing that he will use his liberty to suborn evidence.'

Those remarks were endorsed by Sir Guy Rutledge CJ, in the full bench case of *Emperor v Nga San Htwa* AIR 1927 Rang 205. In the case before us the allegations on which the learned sessions judge has acted in cancelling the applicant's bail appear to us to be of a vague and general character and they
I have not been better defined or substantiated since. In our opinion this is a fit case in which we should, in the exercise of our jurisdiction, set aside the order of the sessions judge and restore that of the city magistrate, Poona.

Another case which Sohoni also relies on is *Emperor v Abhairaj Kunwar* AIR 1940 Oudh 8. This case has an uncanny resemblance to the overtones of the present case. The facts as related by Thomas CJ speak for themselves. The judge said at p 10:

> It has been strongly contended on behalf of the Crown that the accused (Rani Abhairaj Kunwar hereafter called Raj Mata) if released, will tamper with the evidence of the prosecution witnesses.

Thomas CJ continued at pp 11 and 12:

> The case for the prosecution is that Afaq Ahmad, accused, was the manager of Kunwar Sahib (Raj Mata's husband), a fact which is not admitted by Mr Haider Husain (of counsel). The witness (PW22 who is the motor driver of Munni prostitute) has made a very lengthy statement in support of the prosecution case. He has supported the case for the prosecution to the fullest extent. The filing of the application on account of the pressure brought by Afaq Ahmad may or may not be true, and I am certainly not prepared to decide that point. The pressure, if brought, was by Afaq Ahmad and his friends who were in the service of the Raja. The witness does not suggest anywhere in his statement that this was done at the instigation of the Raj Mata or Kunwar Sahib.
>
> The next witness is PW23, Hasan Mohammad Khan, who is a history sheeter and under police surveillance. This witness has stated in his statement that one Mohipal Singh and Puttu Singh threatened him and asked not to give evidence. The witness in spite of the threat has given evidence and supported the case for the prosecution. There again we have nothing on record to show that the present accused were responsible in any way, if the statement of the witness with regard to the threat is believed. The last witness is PW46, Sanwle. This witness certainly has resiled from his statement made before the police. The learned magistrate treated him as hostile and allowed the prosecution to cross-examine him. There again there is absolutely no material before me, nor has any been pointed out by the prosecution, to show that the witness has altered his statement on account of the pressure or threat given by Kunwar Sahib or the Raj Mata. As I have said, Afaq Ahmad, if it is true that he was the manager of the estate, will naturally have the support of the servants of the Raja, and some of them in their zeal to support him may have done this, but I express no opinion one way or the other as to the truth or falsehood of this statement. The learned government advocate has invited my attention to para 9 of the second affidavit filed on 25 August 1939, which is as follows:
>
> > 'That the deponent has received information that Rani Subhadra Devi and her manager, Jagannath Gupta, were threatened on telephone on 16 August 1939, at about 11 pm, by an unknown person that they would be cut into pieces if they did not get the case against the Raja and Raj Mata dismissed. A report of the incident was made by the manager at the PS Hazratganj immediately, and the Superintendent of Police, Lucknow, had to make arrangements for their safety.'
>
> Kunwar Sahib was admittedly in jail on 16 August 1939, and the Raj Mata was released by the learned sessions judge on bail on 16. The orders I am informed were passed at 4.30pm, and she did not get out of the jail till 6.30pm. It is clear that the threat could not have been given by Kunwar Sahib himself. In any case it is not for me to decide the truth or falsehood of the

allegations contained in para 9 of the affidavit which are strongly denied by Mr Haider Husain. Any interested person on behalf of either party can phone and utter the words which are alleged in this para. The mere use of the words 'if they did not get the case against the Raja and Raj Mata dismissed' in my opinion do not convey anything. It is also stated by the learned government advocate that certain accounts have been discovered from a box belonging to the Raj Mata which show that a sum of Rs550 was paid to one Chatterji. The contention is that Mr Chatterji, who is an advocate and is appearing on behalf of Punnu Khan, was paid this amount as his fees in the case for defending the accused. It must be remembered that the name of the Raj Mata was mentioned by the approver in his statement of 17 June 1939. She naturally was anxious, and if she did pay this amount to defend the accused, I personally see no harm in doing that, but this does not mean that she is tampering with the evidence of the prosecution witnesses. I have given serious consideration to the case and I have heard lengthy arguments for nearly two days and I am satisfied that so far no case of tempering with the prosecution evidence by Kunwar Sahib or the Raj Mata has been made out.

All the important witnesses for the prosecution have already been examined and if they are witnesses of the type who are prepared to change their statements on receipt of a few hundred rupees, they will do so whether Raj Mata and Kunwar Shahib are on bail or are in the lock-up. If the accused are in the lock-up there is no doubt that they have got a host of people looking after the case who are just as capable of tampering with the evidence as the accused themselves. It is my duty to see that both sides are not hampered. I must see that the Crown does not get a free hand and the accused are locked up or are hampered in their defence simply on the ground that it is alleged or feared that they will tamper with the evidence. If I had been satisfied that they would tamper with the evidence, I would have been the last person to grant bail in a case of this nature. Mr Haider Husain on behalf of the accused has strongly urged that if they are sent to jail they will not be able to defend the case or arrange for money for their defence. The complainant, Rani Subhadra Devi, her father and brother who remain to be examined in the case, certainly cannot be tampered with by the accused persons, and if there are any other witnesses they are only formal. There is no suggestion on behalf of the Crown that they will abscond.

See also *Paras Ram v The State* AIR 1951 Himachal Pradesh 13. Bannerji JC said at p 15:

> It is the duty of this court to see that the 'state' does not get a free hand and the petitioner is locked up or hampered in his defence, simply on the ground that it is alleged or feared that the accused-petitioner, if enlarged on bail, will very likely tamper with the evidence.

And in *Subbarama Iyer v State* AIR 1953 Travancore-Cochin 25, Koshi CJ said at p 26:

> The reasons for the learned judge's refusal to admit the applicant to bail is based on the apprehension that if enlarged he will tamper with the prosecution evidence. This is the usual slogan which the prosecution raises in opposing bail application and in this case there is no material whatever before me to show that there is any substance behind that apprehension. The state has not chosen to file an affidavit before this court to show that the applicant is an influential person or he is of a desparate character to influence or intimidate

> witness. Before me there is only the 'ipse dixit' of the learned Public Prosecutor that the accused would if enlarged on bail tamper with the evidence. It does not appear that there was before the learned sessions judge either any material to substantiate the apprehension raised on behalf of the prosecution. Courts have repeatedly pointed out that a vague and general allegation that the accused would tamper with the evidence is not a sound reason for refusing bail. See *DR Guru v Emperor* AIR 1930 Bom 484; *Emperor v Abhairaj Kunwar* AIR 1944 Nag 149.

The above cases have repeatedly emphasized that a vague and general allegation that the accused, if released, will suborn or intimidate witnesses or tamper with the evidence or try to obtain false evidence in support of his defence, is not a sound reason for refusing bail. Such an allegation is nothing more than the usual slogan which the prosecution raises in opposing bail. There must be some material put before the court to substantiate the apprehension raised on behalf of the prosecution. Bail is not to be refused merely on the basis of allegations about it. Even the tampering of evidence or intimidation of witnesses by others (unless it could be shown that this was done at the instigation or with the connivance of the accused) is no indication of the possibility that the accused himself would do so (*Emperor v Abhairaj Kunwar* AIR 1940 Oudh 8).

After having stated the principles on which a court will act in refusing bail on matters which concern the danger of witnessed being tampered with, the next step for this court to consider is whether this court should interfere with the exercise of discretion in refusing bail by the court below. Ordinarily, an appellate court will not interfere with the discretion exercised by a lower court on a matter relating to bail. We refer to Goulding J in *Re Reed (a debtor)* [1979] 2 All ER 22, which we think is apposite although the case is not on a matter relating to bail. This is what the judge said, at p 25:

> ... the duties of an appellate court in such a matter as this are, in my judgment, confined to those normally exercisable where the lower court has a discretion, that is to say, we are not justified in setting aside or varying an order simply because we may think we might have come to a different conclusion ourselves on similar material. We can only interfere if either we can see that the court below has applied a wrong principle, or has taken into account matters that are in law irrelevant, or has excluded matters that it ought to have taken into account, or otherwise that no court, properly instructing itself in the law, could have come to the conclusion which in fact was arrived at.

We would not be justified to interfere with the discretion exercised by the judge below simply because we may think we might have come to a different conclusion ourselves on similar material. That would be substituting our discretion for that of the judge below, and that we cannot do.

Was there, then, any material for the court below to exercise its discretion? In the present case, the court below was informed by the tendering of some police reports in court. Such a method of informing the court of the material for refusing bail has been done in *Re K S Menon* [1946] MLJ 49.

A We are unable (as the police reports are not before us) to see if those police reports contained merely vague and general allegations, or that those reports were in fact the first information report or complaint made which would indicate with sufficient exactness the nature of the evidence that is likely to be produced which would implicate the appellant (see *Bail in Singapore* by S Chandra Mohan, at p 86).

B Since we could not express any opinion on the sufficiency of those police reports as we have not seen them, we cannot in this appeal say that the judge had acted improperly when he refused to grant bail. There is a presumption that the judge has rightly exercised his discretion (*Charles Osenton & Co v Johnston* [1942] AC 130).

C The Privy Council in *Ratnam v Cumarasamy & Anor* [1965] 1 MLJ 228 at p 229 has held that the principles upon which an appellate court will act in reviewing the discretion exercised by a lower court are well settled. The court will not interfere unless it is clearly satisfied that the discretion had been exercised on a wrong principle and should have been exercised in a D contrary way or there has been a miscarriage of justice (*Evans v Bartlam* [1937] AC 473).

However, as a result of the conclusion that we have already reached that any order made after 30 July 1998 for the grant or refusal of bail by the High Court is not appealable to the Court of Appeal, the appeal is therefore incompetent and we are, constrained to dismiss it.

E Perhaps, at this point, it is expedient for us to add a rider. Since, as of 31 July 1998, no appeal lies to the Court of Appeal from a decision of the High Court on a bail application, everything now will have to depend on the judicial conscience of a single judge of the High Court who is to exercise his discretion, not in opposition to, but in accordance with, established F principles of law. But, what is there to stop a renegade judge from knowingly misusing his discretion by exercising it in opposition to established principles of law? Sadly, there is nothing that can be done under the law to correct such a miscarriage of justice! We all know the famous aphorism of the historian Lord Acton (First Baron Acton, 1834–1902): 'Power tends to corrupt, and absolute power corrupts absolutely.' — *Letter* G *in Life of Mandell Creighton.* Or we can solace ourselves with the confident optimism of Lord Denning who says: 'Someone must be trusted. Let it be the judges.' (Lord Denning *What Next in the Law*, at p 330). This is how Lord Denning puts it (at p 330):

> There remains the most touchy question of all. May not the judges themselves H sometimes abuse or misuse their power? It is their duty to administer and apply the law of the land. If they should divert it or depart from it — and do so knowingly — they themselves would be guilty of a misuse of power. So we come up against Juvenal's question, '*Sed quis custodiet ipsos custodes?*' (But who is to guard the guards themselves?). That question was asked in the United States at the time of President Roosevelt's New Deal in 1935. It may be asked I here again before long. In theory the judges of the higher echelon are appointed by Her Majesty the Queen: but in practice by the Prime Minister, who in turn looks to the Lord Chancellor. Suppose a future Prime Minister should seek to pack the Bench with judges of his own extreme political colour.

Would they be tools in his hands? To that I answer 'no'. Every judge on his appointment discards all politics and all prejudices. You need have no fear. The judges of England have always in the past — and always will — be vigilant in guarding our freedoms. Someone must be trusted. Let it be the judges.

*Appeal dismissed.*

Reported by Jafisah Jaafar